L.W.D., Inc., L.W.D. Sanitary Landfill, Inc., L.W.D. Trucking, Inc., L.W.D. Field Services, Inc., and Robert Terry, Inc., a Single Integrated Enterprise *and* Oil, Chemical and Atomic Workers International Union, AFL–CIO.[1] Cases 26–CA–18390, 26–CA–18420, 26–CA–18538, 26–CA–18573, and 26–CA–18526

August 31, 2004

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On August 27, 2001,[2] the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in unfair labor practices within the meaning of Section 8(a)(1), (3), and (5) of the National Labor Relations Act.

Thereafter, the Respondent petitioned the United States Court of Appeals for the Sixth Circuit for review of the Board's order and the Board filed a cross-application for enforcement. On September 19, 2003, the court issued its decision granting in part and denying in part the Board's cross-application for enforcement and remanding part of the case to the Board for further consideration.[3] The court affirmed the finding that the Respondent violated Section 8(a)(3) of the Act by discharging employee William Jeffrey Walls, but reversed the Board and found that the Respondent did not violate Section 8(a)(5) by failing to bargain about the use of a forced ranking system to implement layoffs on December 12, 1997, and on March 16, 1998. Additionally, the court remanded to the Board the issue of whether the Respondent violated Section 8(a)(5) by unilaterally placing workers it recalled between December 17, 1997, and March 6, 1998, to positions in the general labor pool without notifying the Union and bargaining over this subject.

Regarding its remand, the court noted the Board's finding that no bargaining impasse could exist in light of the Respondent's preexisting unfair labor practices relating to forced rankings. The court reasoned that since it had reversed those underlying unfair labor practice findings, the Board's rationale for finding no impasse was now invalid. Therefore, the court, citing *Intermountain Rural Electric Association. v. NLRB*, 984 F.2d 1562, 1569 (10th Cir. 1993), remanded the case to the Board for analysis under the five-part impasse test set forth therein, which includes: "(a) the parties' bargaining history, (b) the parties' good faith in negotiations, (c) the length of the negotiations, (d) the importance of the issues over which there is disagreement, and (e) the contemporaneous understanding of the parties as to the state of negotiations on the crucial date."

On March 11, 2004, the Board informed the parties that it had accepted the court's remand and requested that they submit statements of position. Both the General Counsel and the Respondent filed position statements.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the court's limited remand in light of the record and the parties' statements of position. It is well established that the existence of a valid impasse is a defense to the charge of a unilateral change that must be proved by the party asserting the right to act unilaterally.[4] The Respondent in this case does not even contend in its statement of position that the parties bargained to impasse. Indeed, there is no evidence in the record that the parties conducted any bargaining over the Respondent's recall of employees to the general labor pool. Thus, absent bargaining, there can be no valid impasse under the five-part test of *Intermountain Rural Electric Association*, supra.[5]

Because it is now bankrupt, the Respondent asserts that, under Chapter 11 of the Bankruptcy Code, the Board is stayed from initiating further action against the debtor-in-possession to obtain monetary relief from the bankruptcy proceedings. Contrary to Respondent's argument, Board proceedings fall within the exception to the automatic stay provision of the Bankruptcy Code for

[1] The Union is now called Paper Allied Chemical Energy Industrial Union.

[2] 335 NLRB 241. Members Schaumber and Meisburg note that they were not serving on the Board when that decision issued.

[3] Nos. 01-2273 & 01-2546 (unpublished). On November 12, 2003, the court entered a judgment reflecting its decision.

[4] *North Star Steel Co.*, 305 NLRB 45 (1991), enfd. 974 F.2d 68 (8th Cir. 1992).

[5] Applying the impasse standard as the Sixth Circuit directed in its narrow remand order, Members Schaumber and Meisburg conclude that the parties could not have bargained to impasse on Respondent's recall of laid-off employees because no bargaining over that subject actually occurred. See *Intermountain Rural Electric Association*, supra (court's five-part test requires good-faith bargaining). Members Schaumber and Meisburg note that the Board did not previously address various potentially meritorious defenses raised by Respondent, including that the Union waived its right to bargain over the recalls by failing to request timely bargaining, and that Respondent had a past practice of recalling laid-off employees to the general labor pool, which privileged it to continue that practice as part of maintaining the status quo during negotiations. Respondent, however, is no longer represented by counsel apart from the bankruptcy proceedings and does not reiterate those arguments here. They appear, in any event, to be beyond the scope of the remand order.

government units, although collection of any money owed requires separate application to the court.[6] Furthermore, as the General Counsel points out, the Board in this case did not provide any monetary remedy for the Respondent's failure to bargain over the method it used for recalling unit employees from layoff. Rather, the Board ordered that the Respondent bargain in good faith with the Union on this subject.

For these reasons, we reaffirm our finding that the Respondent violated Section 8(a)(5) and (1) by refusing to bargain with the Union regarding its method of recalling the unit employees from layoff. We shall order that the Respondent, on request, bargain with the Union concerning the decision to recall laid-off employees to general labor pool positions.

SUPPLEMENTAL ORDER

The National Labor Relations Board reaffirms its prior Order in relevant part and orders that the Respondent, L.W.D., Inc., L.W.D. Sanitary Landfill, Inc., L.W.D. Trucking, Inc., L.W.D. Field Services, Inc., and Robert Terry, Inc., as a single integrated enterprise, Calvert City, Kentucky, its officers, agents, successor and assigns, shall

1, Cease and desist from

(a) Recalling laid-off employees to positions in the general labor pool between December 17, 1997, and March 6, 1998, without notifying and bargaining with the Union in accordance with Respondent's duty to bargain in good faith under the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union concerning the decision to recall laid-off employees to positions in the general labor pool between December 17, 1997, and March 6, 1998.

(b) Within 14 days after service by Region 19, post at its Calvert City, Kentucky facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time between December 17, 1997, and the date that it may have ceased to exist because of bankruptcy proceedings.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., August 31, 2004

Peter C. Schaumber, Member

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

[6] *R.T. Jones Lumber Co.*, 313 NLRB 726, 727–728 (1994). See also, *NLRB v. Horizons Hotel*, 49 F.3d 795, 803–804 (1st Cir. 1995), enfg. 312 NLRB 1212 (1993); *In re Carib-Inn of San Juan Corp.*, 905 F.2d 561, 562 (1st Cir. 1990).

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT recall employees to positions in the general labor pool between December 17, 1997, and March 6, 1998, without notifying and bargaining with the Union in accordance with the duty to bargain in good faith under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL, on request, bargain with the Union concerning our decision to recall laid-off employees to positions in the general labor pool between December 17, 1997, and March 6, 1998.

L.W.D., INC., L.W.D. SANITARY LANDFILL. INC., L.W.D. TRUCKING, INC., L.W.D. FIELD SERVICES, INC., AND ROBERT TERRY, INC., A SINGLE INTEGRATED ENTERPRISE